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Nos. 83-1171 and 83-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ENERGY REGULATORY COMMISSION,
EXXON CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT ASSOCIATED GAS DISTRIBUTORS

JOSEPH M. OLIVER, JR.*
JENNIFER N. WATERS
PETER K. LEVINE
CROWELL & MORING
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-5960
Attorneys for Respondent Associated Gas Distributors

* Counsel of Record

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QUESTION PRESENTED

The Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301 *et seq.*, establishes maximum lawful prices, based upon energy content, for natural gas sales. The Federal Energy Regulatory Commission was authorized to raise these prices only in certain, very limited, circumstances. Commission Order Nos. 93 and 93-A changed a widely accepted and consistently implemented methodology for determining the energy content of natural gas for ceiling price purposes. The effect of this change was to raise congressionally mandated ceiling prices by approximately 1.74 percent. The question presented for review is whether the court of appeals was correct in finding this price increase to be fundamentally at odds with the NGPA and its legislative history.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
SUMMARY OF REASONS FOR DENYING THE PETITION	5
REASONS FOR DENYING THE PETITION	5
A. Judicial Deference To The Commission's Erroneous Statutory Interpretation Is Not Appropriate	5
B. The Commission's Rule Was Inconsistent With The NGPA And Its Legislative History	9
CONCLUSION	17

TABLE OF AUTHORITIES

Cases Page

Adamo Wrecking Co. v. *United States*, 434 U.S. 275 (1978) 6, 7
Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) .. 7
Batterton v. *Francis*, 432 U.S. 416 (1977) 9
Bureau of Alcohol, Tobacco and Firearms v. *FLRA*, 52 U.S.L.W. 4013 (U.S. Nov. 29, 1983) 6
Columbia Gas Development Corp. v. *FERC*, 651 F.2d 1146 (5th Cir. 1981) 14
Consumer Product Safety Comm'n v. *GTE Sylvania*, 447 U.S. 102 (1980) 6
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) 14
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 6
Morton v. *Ruiz*, 415 U.S. 199 (1974) 9
NLRB v. *Brown*, 380 U.S. 278 (1965) 5
Piper v. *Chris-Craft Industries*, 430 U.S. 1 (1977) .. 6
Public Service Comm'n v. *Mid-Louisiana Gas Co.*, 51 U.S.L.W. 5030 (U.S. June 28, 1983) 14
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 7, 15
SEC v. *Sloan*, 436 U.S. 103 (1978) 5
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 6
United States v. *Lovasco*, 431 U.S. 783 (1977) 7
Volkswagenwerk v. *FMC*, 390 U.S. 261 (1968) 5

Administrative Decisions

FPC Opinion No. 464, 33 F.P.C. 1228 (1965) 13
FPC Opinion No. 468, 34 F.P.C. 159 (1965), *aff'd sub nom. Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) 2, 10-11, 13
FPC Opinion No. 662, 50 F.P.C. 390 (1973) 11
FPC Opinion No. 699-H, 52 F.P.C. 1604 (1974) 3, 13
FPC Opinion No. 770, 56 F.P.C. 509 (1976), *aff'd sub nom. American Public Gas Ass'n* v. *FPC*, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978) 3, 11, 12

Statutes

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1982) 8
Section 706, 5 U.S.C. § 706 9

TABLE OF AUTHORITIES—Continued

	Page
Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (1982)	*passim*
Section 4, 15 U.S.C. § 717c	2
Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.* (1982)	*passim*
Section 104, 15 U.S.C. § 3314	3, 12, 13
Section 105(b), 15 U.S.C. § 3315(b)	15
Section 106(a), 15 U.S.C. § 3316(a)	3, 12, 13
Section 109(b), 15 U.S.C. § 3319(b)	3, 12
Section 204(e), 15 U.S.C. § 3344(e)	16
Section 501(b), 15 U.S.C. § 3411(b)	7, 8
Miscellaneous	
H.R. Rep. No. 496, Part 4, 95th Cong., 1st Sess. (1977), 1978 U.S. Code Cong. & Ad. News 8454	14
S. 1469, 95th Cong., 1st Sess. § 406(b) (1977)	16
18 C.F.R. § 270.204 (1983)	3, 4
43 Fed. Reg. 53,333, 53,280 (1978)	3
Court of Appeals Brief for Respondent FERC	6, 8

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BRIEF IN OPPOSITION FOR RESPONDENT ASSOCIATED GAS DISTRIBUTORS

Associated Gas Distributors (AGD)[1] hereby responds in opposition to the petition of Exxon Corporation, *et al.* (Producers) and the Federal Energy Regulatory Commission (Commission or FERC) for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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[1] AGD was a petitioner and intervenor in the proceedings below. It is an informal association of some forty local gas distribution utilities that sell and distribute approximately 25 percent of the natural gas sold in the interstate market. Its members purchase most of their supplies of natural gas from interstate pipeline companies which, in turn, purchase most of their supplies from producers. The prices paid by interstate pipelines for gas supplies are flowed through to the pipelines' distributor-customers under FERC-approved purchased gas adjustment (PGA) procedures. Pursuant to Sup. Ct. R. 28.1, a list of AGD member companies and their affiliates is attached as an Appendix hereto.

STATEMENT OF THE CASE

1. Prior to the passage of the Natural Gas Policy Act of 1978 (NGPA), the Federal Power Commission (FPC) and later FERC established maximum wellhead prices for natural gas sales pursuant to the "just and reasonable" standard of section 4 of the Natural Gas Act (NGA), 15 U.S.C. § 717c (1982). Because gas is sold on a volumetric basis, ceiling prices were expressed in terms of cents per thousand cubic feet (Mcf's). Prices per Mcf were then adjusted to "reflect the energy content of the gas, which in reality is what the consumer is purchasing." FPC Opinion No. 468, 34 F.P.C. 159, 223 (1965).

2. The energy content of natural gas is measured in terms of British thermal units (Btu's). The presence or absence of combustible substances (such as propane, butane and ethane) and non-combustible substances (such as carbon dioxide, helium and nitrogen) can affect the Btu content of a given volume of natural gas by 50 percent or more. The presence or absence of water vapor will also slightly affect the energy content of the gas.[2]

Under the NGA, Btu content was measured for pricing purposes under specified, standard conditions of temperature, pressure, and water vapor content. Although varying amounts of water vapor can affect the energy value of a gas sample, "the Commission sought to factor out this relatively small variable—to ensure ease of measurement and consistency among samples." 716 F.2d at 4.[3] This standard Btu measurement practice became known as the "wet" method.

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[2] Under typical delivery conditions, fluctuations in water vapor content will affect Btu value by no more than 0.15 percent. Order No. 93-A, reproduced in Appendix B to the FERC Petition, at App. 78a and n.2. Hereafter, all Appendix citations will be to the Commission's Appendices.

[3] The court of appeals' decision is reported in *Interstate Natural Gas Ass'n* v. *FERC*, 716 F.2d 1 (D.C. Cir. 1983).

The wet rule enjoyed widespread industry acceptance and consistent FPC implementation for over fifteen years. Originally proposed in 1961, the rule was expressly sanctioned by the Commission in 1965, and was adopted in both area and national rate proceedings under the NGA. 716 F.2d at 5. Indeed, in its first national rate proceeding, the Commission specifically rejected an argument by natural gas producers that Btu content should be redefined in terms of "dry" or "as delivered" conditions. FPC Opinion No. 699-H, 52 F.P.C. 1604, 1630 (1974).

3. In November of 1978, Congress enacted the NGPA, which substituted congressionally mandated ceiling prices for the maximum rates established by the Commission. The NGPA's ceiling prices were stated in terms of Btu's, rather than in terms of Btu-adjusted Mcf's as had been the practice under the NGA. In a number of cases, however, Congress carried over NGA rates directly into the NGPA. NGPA §§ 104, 106(a), 109(b), 15 U.S.C. §§ 3314, 3316(a), 3319(b) (1982). This was possible because unadjusted base rates under the NGA were established for natural gas with an energy value of one million Btu's, or one MMBtu, per Mcf (wet measure). *See, e.g.*, FPC Opinion No. 770, 56 F.P.C. 509, 602 (1976).

4. On November 15, 1978, the Commission proposed, and on December 1, 1978 the Commission adopted, an interim Btu measurement rule for the NGPA. The new rule was virtually identical to its NGA predecessor, and nothing in the preamble to the rule indicated that the Commission intended to depart from its well-established practice. 43 Fed. Reg. at 53,333 and 53,280 (1978), *quoted in* 716 F.2d at 6.

Eighteen months later, on July 16, 1980, the Commission issued Order No. 93, which "adopted" the interim rule as the final rule, changing only its format. 18 C.F.R. § 270.204, reproduced at App. 50a. The preamble to Order

No. 93, however, stated that measurements obtained under standard conditions would have to be "converted" to reflect "dry" or "as delivered" energy content. Order No. 93 at App. 43a. Only a single sentence of explanation was offered for this dramatic reversal. *Id.*

In Order No. 93-A, issued on April 24, 1981, the Commission reaffirmed both section 270.204 and the new dry measurement policy. Dry measurement, the Commission asserted, was necessary to establish precise Btu correlations between natural gas and other fuels. Order No. 93-A at App. 63a. Finally, on December 24, 1981, the Commission changed the text of section 270.204, incorporating the new "dry" or "as delivered" policy into the regulation itself. Order Vacating Partial Stay and Amending Regulations at App. 90a-92a. Because the Commission considered each of its orders to be a "clarification" of the interim rule, the Order No. 93 rule was made retroactive to December 1, 1978. App. 73a and 91a.[4]

5. The court of appeals reached a unanimous decision that the Commission's Btu measurement rule must be vacated. The court held that not only did the NGPA not require a change to the dry measurement rule from long industry and Commission practice, the NGPA did not even permit such a departure. Upon consideration of four petitions for rehearing, the panel, again unanimously, denied them. Finally, upon consideration of four suggestions for rehearing *en banc*, the full court sitting *en banc* denied the suggestions because no member of the court requested the taking of a vote thereon.

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[4] AGD and other parties below challenged the Commission's lack of effective notice and its retroactive application of the rule to more than three years of natural gas sales. The court of appeals found it unnecessary to reach these issues because it vacated the rule in its entirety on the ground that it was inconsistent with the NGPA. 716 F.2d at 4, 9, 10, 15. Of course, if that decision were reversed, the procedural issues would remain to be adjudicated.

SUMMARY OF REASONS FOR DENYING THE PETITION

The petitions for a writ of certiorari should be denied because the decision below was correct. The court of appeals accorded the dry measurement rule the deference properly due an agency's non-contemporaneous statutory interpretation. The court found the rule unreasonable because it displaced the only measurement technique of which Congress could have been aware and contradicted Congress's intent to carry over NGA price ceilings for certain categories of natural gas. Under such circumstances, the court of appeals had no choice but to vacate the rule.

REASONS FOR DENYING THE PETITION

A. Judicial Deference To The Commission's Erroneous Statutory Interpretation Is Not Appropriate.

Despite overwhelming evidence that Congress intended to carry over wet measurement techniques to the NGPA, Petitioners maintain that the court of appeals should have deferred to the contrary judgment of the Commission. FERC Petition at 12-13; Producers Petition at 19-20. As this Court has repeatedly recognized, however, the courts are the final authorities on issues of statutory construction and "are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *SEC* v. *Sloan*, 436 U.S. 103, 118 (1978) (quoting *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965) and *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968)). This is precisely the outcome that the court of appeals sought to avoid in this case:

> Thus, however more appealing the dry rule may be to the Commission's sense of scientific aesthetics and accuracy, it is not for the Commission to "improve" the statutory design chosen by Congress.

716 F.2d at 15.

1. The Commission conceded below that the dry rule was a mere interpretation of congressional intent, and was not intended to be "legislative" in effect. Court of Appeals Brief for Respondent FERC at 24-25, 28 n.28; 716 F.2d at 9, 15. An interpretive rule may be upheld only if it is a "reasonable and defensible" interpretation of the statute at issue. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 52 U.S.L.W. 4013, 4015 (U.S. Nov. 29, 1983). Among the factors to be considered in determining whether an interpretive rule is reasonable are:

> . . . the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Adamo Wrecking Co. v. *United States*, 434 U.S. 275, 287 n.5 (1978) (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Deference to such rules is appropriate only where "an agency has rendered binding, consistent, official interpretations of its statute over a long period of time." *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 41 n.27 (1977). A non-contemporaneous interpretation that contradicts an agency's earlier position "does not fare well under these standards." *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-42 (1976); *see also Consumer Product Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 120 & n.17 (1980).

2. Order Nos. 93 and 93-A did not reflect a long-standing and consistent interpretation of the NGPA. Nor did they represent a contemporaneous interpretation of that statute. Rather, they represented a dramatic change from fifteen years of consistent Commission practice that was first announced two years after the NGPA was enacted. The Commission's initial Btu measurement rule, issued contemporaneously with the statute, was virtually identical to the established wet rule.[5] 716 F.2d

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[5] Indeed, a number of producers interpreted the interim rule as a wet rule, and challenged it on that basis. 716 F.2d at 7-8. The

at 6. Order No. 93, issued a year and a half later, stated for the first time that Btu values obtained under the Commission's wet rule would have to be "converted" to dry values. Only a single sentence of support was offered for this dramatic reversal. Order No. 93 at App. 43a. Thus, the Commission's new dry rule was adopted in a hesitating, inconclusive manner, and was first explained to the public in Order No. 93-A, issued on April 24, 1981, two and a half years after the NGPA was enacted. As the dry rule was promulgated "by implication" (at best) in 1978, it may not be construed as "contemporaneous construction" of the NGPA, and is not entitled to great judicial deference. *Adamo Wrecking Co.*, 434 U.S. at 287 n.5.

3. Petitioners assert that the dry rule was promulgated pursuant to the Commission's authority under NGPA section 501(b), 15 U.S.C. § 3411(b) (1982), to define technical and accounting terms. FERC Petition at 18-19; Producers Petition at 22-25. Thus, they argue that the rule was left to "the ultimate discretion of the Commission" (FERC Petition at 18) and the court of appeals "usurped an administrative function" when it found the Commission's rule to be in conflict with the statute. Producers Petition at 25.

This is a distortion of the applicable standard of review. First, section 501(b) was not invoked in Order Nos. 93 or 93-A, or in any of the briefs in the court of appeals.[6] To the contrary, the Commission asserted below *only* that the NGPA *required* dry measurement, not that the NGPA left the question to FERC's discretion. Indeed, the Commission argued that it "was given no independent authority under the NGPA to de-

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Commission itself has gone as far as to admit that this rule was "vague" and "ambiguous". Order No. 93-A at App. 72a, 73a.

[6] The Commission may not now raise an argument that did not form part of the articulated basis of its rule, *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943), and that was not even raised before the court of appeals. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

fine 'Btu'." Brief for Respondent FERC at 28 n.28, *quoted in* 716 F.2d at 15.[7] The dry rule was a mere interpretation of congressional intent, the Commission argued, and could therefore be applied retroactively and without notice and an opportunity for comment. FERC Brief at 24-25, 28-29. If it were now determined that the dry rule was a definition committed to the FERC's discretion under section 501(b), the rule would have to be vacated for failure to comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1982).

Second, the Petitioners' new contention that the NGPA vested in FERC the *discretion* to impose a dry measurement rule *or not* is utterly inconsistent with the legislative history, which demonstrates that Congress prescribed exact ceiling prices (in dollars), and the unit to which they should be applied (Btu's), based on careful consideration of their relationship to oil prices and their impact on producers and consumers. It is simply not plausible that Congress left to FERC the discretion to alter that price impact by a factor of 1.74 percent if it wished.[8]

Finally, even if the Commission were allowed to reverse ground and base its decision on section 501, that section would not support the orders at issue here. Section 501 specifically states that the Commission may define technical and accounting terms in a manner *con-*

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[7] Producers thus err when they assert that it was the court of appeals' "conclusion" that FERC lacked independent authority to define "Btu" (Producers Petition at 22) and that the court of appeals "provides no basis for its decision to interfere in the Commission's exercise of its [section 501] authority." *Id.* at 24.

[8] If FERC had discretion at all, it would have been to (1) convert to dry measurement and (2) make a compensating 1.74 percent reduction in the NGPA ceiling prices, so as not to tamper with the actual price impact established by Congress. The Commission expressly rejected that approach. Order No. 93-A at App. 65a-69a.

sistent with the Act itself. Indeed, it is a general rule of administrative law that "[i]n order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose." *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974). Yet, as the court of appeals found, the Commission's dry rule was "inconsistent with the NGPA's language, structure, and legislative history," and "fundamentally at odds with the Btu measurement technique" implicit in the Act. 716 F.2d at 14, 15.[9]

B. The Commission's Rule Was Inconsistent With The NGPA And Its Legislative History.

The court of appeals correctly found that, in enacting the NGPA, Congress intended to set ceiling prices on the basis of the well-established "wet" method of measuring Btu's. The court gave three reasons for this conclusion. First, when Congress enacted the NGPA, it directly incorporated NGA ceiling prices for certain categories of natural gas. This interchangeability of NGA ceiling prices and NGPA ceiling prices is *only* possible if the *same* Btu measurement technique is used in both cases. Second, the wet method was the only method of Btu measurement with which Congress was, or could have been, familiar. Finally, Congress specifically rejected

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[9] The Commission contends that:

> Absent a finding that the Commission's action in issuing the Btu Rule was arbitrary, capricious, or an abuse of discretion—a finding that the court of appeals did not even attempt to make—the court was without authority to overturn the Commission's rule.

FERC Petition at 19. Section 706 of the APA, to which the Commission apparently alludes, provides that the reviewing court shall set aside agency conclusions that are "arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law*." 5 U.S.C. § 706(2)(A) (1982) (emphasis added). Although interpretive rules are ordinarily accorded a less deferential standard of review, *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977), the court of appeals *did* find that the Commission's position was "not in accordance with law." 716 F.2d at 15.

the "hyper-accurate" inter-fuel comparisons propounded by FERC and the Producers as a basis for natural gas pricing. In all three respects, the court was correct.

1. When Congress enacted the NGPA, it directly incorporated NGA maximum price levels for certain categories of gas. This carryover of NGA pricing, the court of appeals found, indicated a congressional intent to carry over the established wet measurement techniques underlying NGA pricing. 716 F.2d at 13.

Petitioners object to this finding. NGA ceiling prices were set in terms of cents per Mcf, they assert, while NGPA ceilings are set in terms of cents per MMBtu.[10] FERC Petition at 16-17; Producers Petition at 21. No direct correlation exists between the two pricing systems, they contend. Order No. 93-A at App. 60a.

The Commission's position on this issue is demonstrably incorrect. First, NGA price ceilings were adjusted to reflect directly the Btu content of natural gas. Second, unadjusted NGA price ceilings are directly convertible from Mcf's to MMBtu's only if the same Btu measurement technique is used in both cases. Thus, there *is* a direct correlation between the Mcf pricing of the NGA and the Btu pricing of the NGPA, and this correlation *requires* the carryover of wet Btu measurement into the NGPA pricing scheme.

First, adjusted NGA price ceilings directly reflect the Btu content of natural gas sold. Although NGA ceiling prices were set on an Mcf basis, these prices were adjusted to reflect Btu content. The purpose of these Btu adjustments was to allow gas prices to "reflect the energy content of the gas, which in reality is what the consumer is purchasing." FPC Opinion No. 468, 34 F.P.C.

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[10] The Commission implies that NGA ceiling rates were set only "within broad ranges". FERC Petition at 11. That is not correct. Like NGPA maximum prices, NGA just and reasonable rates were prescribed in the form of exact ceilings. *See, e.g.*, 716 F.2d at 13.

159, 223 (1965); FPC Opinion No. 662, 50 F.P.C. 390, 399 n.18 (1973).[11] This was also their effect: a higher Btu content meant a higher price for a given volume of natural gas. Furthermore, Btu adjustments were always made "on a proportional basis." *See, e.g.*, FPC Opinion No. 770, 56 F.P.C. at 602. Thus, a ten percent increase in Btu content meant a ten percent increase in the price per Mcf, while a five percent reduction in Btu content meant a five percent reduction in the Mcf price. FPC Opinion No. 468, 34 F.P.C. at 223 n.46.[12] The result was that the price for a given number of Btu's was constant regardless of the volume of gas in which those Btu's were actually delivered.

Second, unadjusted NGA price ceilings are directly convertible from Mcf's to MMBtu's as long as the same Btu measurement technique is used in both cases. Unadjusted NGA price ceilings were established for natural gas with an energy value of one million Btu's, or one MMBtu, per Mcf. *See, e.g.*, FPC Opinion No. 770, 56 F.P.C. at 602. Thus, Congress was able to carry over price ceilings from the NGA to the NGPA simply by substituting "MMBtu" for "Mcf" and eliminating the

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[11] The Commission asserts that these Btu adjustments were intended only for "quality control," and not as part of a pricing mechanism. FERC Petition at 17. Yet, as FERC admits, their purpose was to provide "some incentive to maximize the Btu content of interstate gas." *Id.* In short, the Btu adjustments operated to reward higher Btu's with a proportionately higher price. That is exactly the same as the operation of MMBtu pricing under the NGPA.

[12] Petitioners note that many early area rates provided no Btu adjustment for gas with a Btu content of between 1000 and 1050 Btu's per Mcf. FERC Petition at 4 n.4; Producers Petition at 4 n.6. In the early 1970's, various natural gas producers attacked this "Btu gap" as "illogical and not based on evidentiary support." The Commission agreed, and eliminated the gap. FPC Opinion No. 662, 50 F.P.C. at 399.

Btu adjustment.[13] This intended correlation is possible, however, *only* if the *same* Btu measurement technique is used under the NGPA as under the NGA.[14]

The one MMBtu per Mcf equivalency of unadjusted NGA price ceilings is based on wet measurement techniques. *See, e.g.*, FPC Opinion No. 770, 56 F.P.C. at 602. When FERC substituted dry measurement techniques under the NGPA, it destroyed the direct equivalency intended by Congress, raising prices by 1.74 percent. As the court of appeals noted,

> Congress did not intend for the Commission to raise the effective wellhead price of gas as much as possible. Rather, Congress itself specified the maximum lawful prices of most categories of gas and author-

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[13] For two pricing categories, Congress adopted the maximum price levels set by the FPC under the NGA, changed the denominator from Mcf's to MMBtu's, and applied an inflation adjustment. NGPA §§ 106(a), 109(b), 15 U.S.C. §§ 3316(a), 3319(b) (1982). *See* 716 F.2d at 13. For a third category, Congress mandated that the NGPA price ceiling for section 104 gas would be the "just and reasonable" NGA rate for such gas as of April 20, 1977. 15 U.S.C. § 3314 (1982). The specified NGA rate was $1.45 per Mcf, and the Commission imposed an NGPA price of $1.45 per MMBtu. Order No. 93-A at App. 65a-69a. Congress intended to achieve the same effect in incorporating NGA prices by reference as it had achieved by carrying over specific dollar values. Order No. 93-A at App. 57a n.9, 66a.

[14] The Commission's Order No. 93-A calculation, which purports to show the contrary, is demonstrably incorrect. Order No. 93-A at App. 84a-85a. The Commission assumes (1) a cash flow of $1 million; (2) an energy value of one MMBtu per Mcf (*dry* measure); and (3) delivered volume of one million Mcf of natural gas. The Commission then proceeds to argue that dry measurement techniques would be required to produce an NGPA price of $1.00/MMBtu. The *NGA* price would be $1.00/Mcf, however, only if dry measurement were used under that statute. As NGA pricing was premised upon *wet* measurement, assumption (2) above yields an NGA energy value of less than one MMBtu per Mcf, requiring a downward price adjustment under that statute, and rendering the Commission's price and cash flow assumptions inconsistent.

ized the Commission to raise those prices only in certain, very limited, circumstances.

716 F.2d at 15. Thus, the congressional intent to carry over NGA just and reasonable rates for certain categories of natural gas *requires* the carryover of wet measurement techniques applied under the NGA.[15]

2. Moreover, the wet method was the only Btu measurement technique of which Congress was aware at the time the NGPA was enacted. At that time, the Btu content of natural gas had been defined by the Commission in terms of a standardized, saturated condition for over fifteen years.[16] 716 F.2d at 12. The wet rule, the court found, was the only method of measuring Btu's that was even tangentially acknowledged in the NGPA's history. *Id.* Thus, both the NGPA and its legislative history are replete with references to the "just and reasonable" rates established under the NGA. *See, e.g.*, NGPA §§ 104, 106(a), 15 U.S.C. §§ 3314, 3316(a)

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[15] The Commission asserts that the court of appeals failed to explain how this implicit codification of the wet method can apply to those pricing provisions that make no reference to NGA just and reasonable rates. FERC Petition at 15. As the Commission itself explained in Order No. 93-A, however, "identical provisions in a statute" should be interpreted consistently where there is no "compelling reason to do otherwise." Order No. 93-A at App. 64a.

[16] Wet measurement of Btu content had been used to apply Btu adjustments in every area rate and national rate proceeding under the Natural Gas Act beginning in 1965. *See, e.g.*, FPC Opinion No. 468, 34 F.P.C. 159, 224 (1965) (first area rate case) (incorporating wet measurement standard of Opinion No. 464, 33 F.P.C. 1228, 1238 (1965)); FPC Opinion No. 699-H, 52 F.P.C. 1604, 1630 (1974) (first national rate case). Indeed, in 1974 the Commission specifically considered and rejected the producers' arguments that the Btu content of gas should be "adjusted for the water vapor content in the gas as it is delivered." FPC Opinion No. 699-H, 52 F.P.C. at 1630.

(1982). These NGA rates included Btu adjustments based on standard wet measurement techniques.[17]

Furthermore, there is no evidence of any contrary legislative intent. As a general rule, "an important and controversial change in existing law" should not be inferred from congressional silence. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979). *Cf. Columbia Gas Development Corp.* v. *FERC*, 651 F.2d 1146, 1158 (5th Cir. 1981) (in replacing NGA price ceilings, Congress did not intend to replace other price-related procedural provisions of that Act). Thus, the court of appeals concluded, "the Commission's attribution to Congress of a price component with which it was wholly unfamiliar is unreasonable." 716 F.2d at 13.[18]

In the face of more than fifteen years of consistent practice by FERC and the Federal Power Commission, Petitioners claim that certain unregulated, pre-NGPA

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[17] As the House committee report accompanying one of the NGPA's forerunner bills acknowledged,

> The reference to FPC-determined just and reasonable prices and contract prices for purposes of determining maximum lawful prices under section 405 incorporates Btu adjustments and other quality adjustments provided for in FPC rate determinations or in the applicable contract.

H.R. Rep. No. 496, Part 4, 95th Cong., 1st Sess. 103 (1977), 1978 U.S. Code Cong. & Ad. News 8454, 8547. Although the final version of the NGPA differed in many respects from this bill, the concept of carrying over just and reasonable rates remained. 716 F.2d at 12.

[18] Petitioners cite this Court's opinion in *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 51 U.S.L.W. 5030 (U.S. June 28, 1983), for the novel proposition that in the absence of express direction of Congress, all pre-NGPA practices should be deemed repealed. Producers Petition at 14-16. *Mid-Louisiana* in fact holds that, given the comprehensive nature of the NGPA, no *source of production* should be excluded from its coverage unless clearly identified in either the statute or its legislative history. 51 U.S.L.W. at 5035.

contracts for intrastate sales of natural gas included "dry" Btu measurement provisions. These provisions, Petitioners suggest, "might" have been what Congress had in mind when it enacted the NGPA. FERC Petition at 14-15, 17-18; Producers Petition at 20-21.[19] This is sheer speculation. Petitioners cite absolutely no support for *either* (a) the assertion that intrastate contracts traditionally employed dry measurement *or* (b) the assertion that Congress was familiar with such contracts. The Commission did not rely upon, or even mention, "dry measurement" provisions of intrastate contracts in Order Nos. 93 or 93-A, and neither FERC nor the Producers raised this issue before the court of appeals. Thus, even if these hypothetical contractual provisions existed, they were not a part of the articulated basis of Order Nos. 93 and 93-A, and could not be used to bolster those orders on review. As this Court stated in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943), "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

3. Finally, the hyper-accurate inter-fuel comparisons underlying the Commission's dry rule were rejected by Congress. In Order No. 93-A, the Commission articulated only one reason for abandoning the wet measurement rule. Congress had established natural gas prices

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[19] Petitioners further argue that conversion of these intrastate contracts to wet measurement will somehow force intrastate sellers to receive less than the maximum prices prescribed by their contracts, a result that "Congress clearly did not contemplate." FERC Petition at 18. On the contrary, in section 105(b)(2) of the NGPA, 15 U.S.C. § 3315(b)(2) (1982), Congress specifically addressed the problem of existing intrastate contract prices exceeding the ceiling prices imposed by the Act. If, in fact, there were intrastate contracts that applied dry measurement techniques in such a manner as to exceed NGPA ceiling prices—a speculation for which there is no evidence in the record—the rates prescribed in these contracts should have been set in accordance with this section.

by reference to the prices of alternative fuels, the Commission argued, and "true comparison" of fuel energy values "can only be achieved" with dry measurement techniques. Order No. 93-A at App. 63a. Producers repeat this argument at length, citing provisions from early House and Senate versions of the NGPA, as well as Dr. Schlesinger's testimony on the original administration proposal.[20] Producers Petition at 17-18.

As the court of appeals observed, however, Congress abandoned inter-fuel price-indexing in the final version of the NGPA. 716 F.2d at 14. Neither the "current Btu equivalent price" provisions cited by the Producers, nor the parallel provisions in the proposal to which Dr. Schlesinger referred, ever became law. Moreover, Congress demonstrated its acceptance of commonly accepted "standard assumptions" about the energy content of various fuels in other statutory provisions enacted contemporaneously with the NGPA. 716 F.2d at 14.[21] Thus, although Congress considered the value of alternative energy sources in establishing NGPA ceilings, it specifically rejected the hyper-accurate inter-fuel comparisons that Petitioners now propound.

Finally, the Petitioners' emphasis on the need for "accurate" and "precise" Btu measurement is extremely misleading. *See, e.g.*, FERC Petition at 10; Producers Petition at 10. Under the dry rule, as under the wet

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[20] This proposal included *Mcf* pricing for natural gas. *See* S. 1469, 95th Cong. 1st Sess. § 406(b) (1977).

[21] Indeed, the Commission itself has endorsed the use of standard assumptions about inter-fuel Btu comparisons in its implementation of the *one* NGPA provision that *does* retain such comparisons. NGPA section 204(e), 15 U.S.C. § 3344(e) (1982), requires that the Commission determine the cost of alternative fuels on an MMBtu basis. Yet, in its implementing regulations, the Commission adopted a standard conversion factor, specifically rejecting suggestions that costs be adjusted to accommodate variations in Btu content among differing qualities of oil. 716 F.2d at 14.

rule, only the Btu content of a tiny sample of gas is actually measured. Since passage of the NGPA, natural gas continues to be sold on a volumetric basis. Order No. 93-A at App. 82a. The total number of Btu's sold is computed by multiplying the Btu content of the sample by the volume of gas delivered. Producers' Petition at 9; Order No. 93-A at App. 53a n.5. Similarly, the "conversion" process required by the dry rule was simply that of a mathematical computation. Order No. 93 at App. 43a; Order No. 93-A at App. 71a.

Moreover, contrary to its purported preoccupation with the need for "precise" Btu measurement, the Commission has been extremely relaxed about the measurement techniques actually applied. The Commission has stated that it will accept "any estimation method reasonably designed to measure Btu content" (Order No. 93 at App. 43a), any measurement instrument agreed upon by the parties (App. 44a), and any measurement procedure and measurement frequency accepted in the industry. Order No. 93-A at App. 52a, 71a. In reality, then, the dry rule would yield *no* additional accuracy, *only* a 1.74 percent increase in the price ceilings mandated by Congress.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH M. OLIVER, JR.*
JENNIFER N. WATERS
PETER K. LEVINE
CROWELL & MORING
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-5960

Attorneys for Respondent Associated Gas Distributors

* Counsel of Record

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APPENDIX

APPENDIX

ASSOCIATED GAS DISTRIBUTORS

Baltimore Gas & Electric Company

Affiliate:

Safe Harbor Water Power Corporation

Bay State Gas Company

Subsidiaries:

Bay State Exploration, Inc.
Northern Utilities

Subsidiary: Granite State Gas Transmission Co.

The Berkshire Gas Co.

Boston Gas Co.

Parent:

Eastern Gas and Fuel Associates

The Brooklyn Union Gas Co.

Subsidiaries:

Fuel Resources, Inc.
Gas Energy, Inc.

Affiliate:

Honeoye Storage Corp.

Central Hudson Gas & Electric Corp.

Subsidiaries:

Cruger Development Corp.
Greene Point Development Corp.
Phoenix Development Co., Inc.

Chesapeake Utilities Corp.

Subsidiaries:

Eastern Shore Natural Gas Co.
Dover Exploration Company
Skipjack, Inc.

City of Holyoke, Mass., Gas & Electric Dept.

City of Westfield Gas & Electric Light Dept.

Colonial Gas Co.

Subsidiary:

Trans Gas, Inc.

Commonwealth Gas Co.

Parent:

Commonwealth Energy System

Concord Natural Gas Corp.

Subsidiary:

Concord Gas Service Corp.

Consolidated Edison Company of New York, Inc.

Delmarva Power & Light Co.

Subsidiary:

Delmarva Energy Co.

Elizabethtown Gas Co.

Parent:

National Utilities & Industries Corporation

EnergyNorth, Inc.

Subsidiaries:

Manchester Gas Co.
Gas Service, Inc.

Essex County Gas Co.

Fitchburg Gas & Electric Light Co.

Subsidiary:

Fitchburg Energy Devel. Co.

Long Island Lighting Co.

Lynchburg Gas Co.

Subsidiary:

Lynco Development Co.

New Jersey Natural Gas Co.

Subsidiaries:

Gas Associated Services, Inc.
New Jersey Natural Gas Resources Co.

New York State Electric & Gas Corp.

Northeast Georgia Municipal Gas Utilities

City of Bowman, Ga.
City of Buford, Ga.
City of Commerce, Ga.
City of Covington, Ga.
City of Elberton, Gas.
City of Hartwell, Ga.
City of Lawrenceville, Ga.
City of Madison, Ga.
City of Monroe, Ga.
City of Royston, Ga.
City of Social Circle, Ga.
City of Sugar Hill, Ga.
City of Taccoa, Ga.
City of Union Point, Ga.
City of Winder, Ga.

Northeast Uitlities, Inc.

Companies Controlled:

The Connecticut Light & Power Co.
Western Massachusetts Electric Co.
Holyoke Water Power Co.
Northeast Nuclear Energy Co.
The Quinnehtuk Co.
The Rocky River Realty Co.
Northeast Utilities Service Co.

Northern Utilities, Inc.

See: Bay State Gas Co.

Pennsylvania Gas & Water Company

Parent:

Pennsylvania Enterprises, Inc.

Pennsylvania & Southern Gas Co.

Pequot Gas Co.

Philadelphia Electric Co.

Subsidiaries:

Conowingo Power Co.
Eastern Pennsylvania Development Co.

Subsidiaries:

Adwin Equipment Co.
Adwin Realty Co.

Eastern Pennsylvania Exploration Co.

Philadelphia Electric Power Co.

Subsidiary:

The Susquehanna Power Co.

The Susquehanna Electric Co.

Philadelphia Gas Works

Providence Gas Co.

Parent:

Providence Energy Corporation

Public Service Company of North Carolina, Inc.

Subsidiary:

Tar Heel Energy Corp.

Public Service Electric & Gas Co.

Subsidiaries:

Energy Development Corp.
Energy Pipeline Corp.
Energy Terminal Services Corp.
PSESG Research Corp.

South County Gas Co.

South Jersey Gas Co.

Parent:

South Jersey Industries, Inc.

The Southern Connecticut Gas Co.

Parent:

Connecticut Energy Corp.

Subsidiaries:

Gas Storage, Inc.
Onset Marketing Corp.

UGI Corporation

Subsidiaries:

AmeriGas, Inc.
UGI Development Co.

Valley Gas Co.

Parent:

Valley Resources, Inc.

Washington Gas Light Co.

Subsidiaries:

Brandywood Estates, Inc.
Crab Run Gas Co.
Davenport Insulation, Inc.
Frederick Gas Co., Inc.
Hampshire Gas Co.
Shenandoah Gas Co.
Washington Gas Approved Services, Inc.